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BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

Petition No. P3-03 (United Parcel Service, Inc.)

Petition No. P5-03 (National Customs Brokers and Forwarders Association of America, Inc.)

Petition No. P7-03 (Ocean World Lines, Inc.)

Petition No. P8-03 (BAX Global Inc.)

Petition No. P9-03 (C.H. Robinson Worldwide, Inc.)

COMMENTS OF
MENLO WORLDWIDE FORWARDING, INC.
SUPPORTING RELAXATION OF
TARIFF REGULATIONS AND/OR SERVICE CONTRACT RESTRICTIONS
APPLICABLE TO NON-VESSEL-OPERATING COMMON CARRIERS

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Menlo Worldwide Forwarding, Inc. ("Menlo") commends the Commission for its coordinated handling of the recent petitions seeking various exemptions from the unique pricing restrictions that currently hobble the operations of non-vessel-operating common carriers ("NVOCCs"). As a duly authorized and bonded NVOCC and ocean freight forwarder under Ocean Transportation Intermediary ("OTI") license no. 3986NF, Menlo urges the Commission -- for the reasons stated in these combined comments on the above-referenced petitions -- to utilize its broad exemption powers under 46 U.S.C. App. § 1715 as a means to level the playing field between NVOCCs and vessel-operating common carriers ("VOCCs") with regard to the pricing of ocean freight services. To the extent discussed in these comments, the Commission can and should grant NVOCCs an exemption from tariff filing requirements under 46 U.S.C. App. § 1707(a), and/or an exemption permitting NVOCCs to enter into confidential service contracts with their customers under 46 U.S.C. App. § 1707(b).

Menlo's Interest: Menlo Worldwide Forwarding, Inc. is a $2.9 billion company based in Redwood City, California. With 12,000 employees, it operates through more than 500 offices in over 200 countries worldwide. Menlo provides a variety of value-added supply chain services focusing on the worldwide movement of heavyweight freight for commercial, industrial and government customers. Although Menlo was long identified with air freight under its former name (Emery Worldwide) and has 55 years of experience in that mode, Menlo today is truly a multimodal operator. It offers international air and ocean forwarding; North American overnight, expedited, second-day and deferred air freight; customs brokerage, and project management services. Menlo is part of the Menlo Worldwide LLC group of integrated business solutions providers, which also includes Menlo Worldwide Trade Services, Menlo Worldwide Logistics and Menlo Worldwide Technologies. In turn, Menlo Worldwide LLC is part of CNF Inc., a publicly held, $4.9 billion global supply chain management company.

Summarv of Position: Menlo has noted the various positions taken by the five petitions to which these Comments relate. In No. P3-03, United Parcel Service, Inc. (UPS") requests an exemption allowing its NVOCC unit to enter into confidential service contracts directly with its customers (rather than only with vessel-operating carriers as per the current restrictions at 46 U.S.C. App. § 1702(19)). In Nos. P8-03 and P9-03, respectively, BAX Global Inc. ("SAX") and C.H. Robinson Worldwide, Inc. ("Robinson") appear to advocate similar exemptions for a class of NVOCCs meeting various non-statutory criteria relating to such things as asset base, financial stability, compliance history and/or provision of value added services. In No. P7-03, Ocean World Lines, Inc. ("OWL") proposes that NVOCCs obtain more limited confidentiality of rates through administrative expansion of an obscure "special contract" provision in the Commission's regulations relating to ocean freight forwarders. In No. P5-03, the National Customs Brokers and Freight Forwarders Association of America, Inc.

("NCBFAA") proposes that NVOCCs be exempted from the tariff publication requirements of 46 U.S.C. App. § 1707(a), or alternatively, that publications showing only a "range,, of rates be allowed.

Menlo sees common threads here, and urges the Commission to focus on those common threads. Without a doubt, UPS, BAX, Robinson and OWL (like Menlo) are substantial and respected participants in the NVOCC sector while NCBFAA is a respected advocate for that sector. All petitioners point out that the end result of the Commission's current pricing regulations is that NVOCCs are uniquely burdened by the tariff publication requirement, because vessel-operating common carriers ("VOCCs") do the vast majority of their pricing through confidential service contracts. Petitioners also point out that the widespread (and lawful) publication of shipper-specific and commodity-specific rates tends to erode the non-discriminatory "open" pricing supposedly fostered by a tariff environment. Some petitioners question why, as a matter of regulatory policy, the burden of tariff publication should fall uniquely on a competitive sector such as NVOCCs, while VOCCs are allowed both to engage in confidential pricing and to set rates under antitrust immunity. All petitioners contend that their proposals comport with the statutory exemption criteria at 46 U.S.C. App. § 1715, as liberalized by the Ocean Shipping Reform Act of 1998, Pub.L. No. 105-258 ("OSRA").

Menlo agrees with all of these points as far as they go. But Menlo wishes to offer the Commission a broader perspective, gained at the vanguard of today's onrushing intermodal and logistics revolutions. The current tariff pricing regime for NVOCC traffic in the foreign commerce of the United States is out of step with the pricing regime for all other modes, out of step with the pricing regime for most foreign-to-foreign ocean services, and out of step with the contract-based pricing packages that universally are preferred by both providers and users of sophisticated third-party and fourth-party logistics services.' Because logistics

[1] Broadly speaking, third-party logistics providers ("3PLs") offer integrated management, coordination and optimization of the supply chain services rendered by "service providers," e.g.,

contracts often include ocean freight management as part of a much broader package of supply chain management services, the current tariff regulations impede the development and efficient management of sophisticated logistics programs.

For a variety of reasons, this impediment falls more heavily on U.S.-based logistics providers such as Menlo (as well as UPS, BAX, Robinson and OWL) than on their foreign-based competitors. Because U.S. flag VOCCs have practically disappeared, U.S. based logistics providers -- unlike their foreign competitors -- generally do not have the opportunity to assure vessel capacity and pricing cooperation by affiliating with a VOCC. Moreover, U.S. based providers encounter the tariff impediment from the outset of their efforts to include ocean services in the logistics programs marketed to their domestic customer base. By contrast, logistics providers based in such locations as Japan and the European Union can develop their respective domestic customer bases without this concern, and then pick and choose the extent of their involvement in the regulated U.S. ocean market.

These two factors -- the disconnect between pricing regimes for ocean freight and those for other modes, and the resulting disadvantages for U.S. based logistics providers -- make a compelling case for bold use of the Commission's exemption powers. In this regard, the specific proposals by some of the petitioners strike Menlo as far more limited and cautious than the plain language of the liberalized exemption standards under OSRA would allow. We submit that those liberalized standards are in the statute for a purpose; that the purpose is to address changed circumstances; and that the necessary changed circumstances are supplied both by the ongoing intermodal and logistics revolutions, *and* by the compelling need to foster and maintain, in the logistics and NVOCC sectors, the U.S. based competitive presence that already has been virtually lost in the VOCC sector.

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carriers, forwarders and warehouse operators. Fourth-party logistics providers typically manage a network of 3PLs.

Finally, while Menlo declines to be drawn into taking specific positions on each and every nuance of the various proposals by the petitioners, we respectfully suggest that granting exemptions only to specific providers that have asked for them would not satisfy the OSRA exemption criteria and would not address the systemic imbalances between NVOCCs and VOCCs under the current regime. On the other hand, we also suggest that any attempt to define a subclass of "asset owning" or other NVOCCs eligible for relief from tariff-based pricing is likely to be both incomplete and self-defeating. To the contrary, the proper use of any granted exemption can best be policed by continued vigorous enforcement of the Commission's existing regulations on bonding, its scrutiny of character and fitness as part of the OTI application process, and the business standards it has prescribed for all OTIs. Menlo does not advocate modification of, or exemption from, any of those requirements.

Discussion:

(1) The Regulatory Disconnect Between Ocean Services and Other Modes. The current state of this Commission's regulations on the pricing of ocean freight services has no parallel in the other modes comprising the transportation system to, from and within the U.S. The air cargo industry has no remaining rate regulation whatever; see tariff exemptions granted under 49 U.S.C. § 40109 and set forth at 14 CFR §§ 221.2(d)(1)-(3), (9). In the rail industry, confidential contract rates may be utilized by all providers, large or small, 49 U.S.C. § 10709, while rate regulation is limited to situations involving "market dominance" under 49 U.S.C. §§ 10701(d) and 10707.

In the trucking industry, rates have been totally deregulated under 49 U.S.C. § 13701 (with limited exceptions under 49 U.S.C. § 13702 for household goods and certain domestic offshore intermodal movements). Moreover, confidential contracting is available under 49 U.S.C. § 14101(b) to all non-rail surface "carriers" – a term that is defined in 49 U.S.C. § 13102(3) to include surface freight forwarders (the inland equivalent of NVOCCs[2]) and motor carriers. In addition, the statute makes no distinction between the contracting rights enjoyed by motor carriers that own equipment and utilize employee drivers, and by "asset-light,, motor carriers that utilize subcontracted drivers and equipment under 49 U.S.C. § 14102.

Moreover, the Commission's pricing regulations are far from the international norm even in the realm of ocean freight. Menlo is aware of no foreign jurisdiction other than mainland China that has attempted to impose ocean freight tariff requirements or contracting restrictions even remotely resembling those of this Commission. (As suggested by the NCBFAA petition at 15 n.9, the Chinese regulations likely were adopted as a retaliatory measure designed to mirror U.S. regulation.)

This regulatory disconnect has significant consequences for logistics providers offering a package of international supply-chain services to a customer. In the first place, Menlo knows of no foreign or U.S. domestic regulations specifying the form or content of the international logistics contract itself, or requiring publication of its terms. Secondly, a typical contract for international third-party logistics services will include a variety of operations such as (but not necessarily limited to) dedicated trucking, dedicated warehousing, inventory management, inland carrier management, air freight forwarding, NVOCC services, other ocean freight management, and/or customs brokerage. Out of this entire array of services, only ocean freight to and from the U.S. is regulated from a pricing standpoint. But because of the tariff requirements and the service contract restriction, that ocean service will require an inordinate commitment of management resources for tariff maintenance and monitoring of tariff compliance.

And what public purpose is served by all this special attention to the limited ocean segment of the parties' over-all agreement? Menlo submits the answer is "none." Although the "ocean rate" will appear in a published tariff, and the ocean

[2] See definition of "freight forwarder" at 49 U.S.C. § 13102(8).

services of course will be priced as per the tariff rate, the tariff will provide no visibility as to the over-all pricing (for ocean plus non-ocean services) negotiated by the parties to the confidential logistics contract. Moreover, as pointed out by NCBFAA, the "ocean rate" will be a negotiated, customer-specific number. For a logistics provider, that number will reflect a host of factors including, but not limited to, the degree of control the provider will be able to exert over costs and potential liabilities in other segments of the customer's supply chain. The pricing that counts in the marketplace, however, will be the pricing for the total package of services offered to the customer. That pricing will remain confidential – and properly so in a competitive free market.

(2) The Regulatory Disadvantage Faced by U.S. Based Logistics Providers Acting as NVOCCs. It will hardly come as a surprise to this Commission that U.S. flag VOCCs have become few and far between, whereas there is still active and vigorous participation by U.S. providers in the NVOCC sector. This situation raises an obvious question: why should the Commission's tariff regulations continue to favor the foreign-dominated VOCC sector and disadvantage U.S. based NVOCCs? As noted previously, this disadvantage is compounded because foreign based NVOCCs, unlike those in the U.S., have substantial opportunities to affiliate with VOCCs.

It would appear difficult, if not impossible, to reconcile this anomalous competitive imbalance with at least two portions of the Declaration of Policy at 46 U.S.C. App. §§ 1701(1) and (4). Under that declaration, the purposes of the statutes enforced by the Commission include establishment of "a nondiscriminatory regulatory process" for U.S. ocean commerce, and promotion of "the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace." Note that the 'United States exports,, to be promoted are not confined to exports of *goods.* How can the current regime possibly be characterized as "nondiscriminatory,, and market-reliant, let alone as one that promotes U.S. exports of *services, e.g.* supply chain management services?

(3) Breadth of fhe Commission's Exemption Powers: With one possible exception discussed under heading (4) below,[3] the Commission's authority to grant prospective exemptions with regard to ocean freight pricing is unfettered by either the text or the legislative history of 46 U.S.C. App. § 1715. The statutory text allows the Commission to exempt "any specified activity,, by "persons subject to this chapter,, from "any requirement of this chapter [i.e., 46 U.S.C. App. §§ 1701 through 1721]." The only criteria for such an exemption under § 1715 are that it "will not result in substantial reduction in competition or be detrimental to commerce." According to the legislative history (S. Rep. No. 105-61, 1 05th Cong. 2nd Sess., LEXIS print at 30, emphasis supplied), the drafters of OSRA recognized that:

> while Congress has been able to identify *broad areas* of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process *specific regulatory provisions and practices* not yet addressed by Congress to determine where they can be deregulated consistent with the policy of Congress.

Some may suggest that because Congress declined in 1998 to eliminate tariff publication requirements or to allow NVOCCs to enter into service contracts, this means that Congress has "addressed" these matters and they are therefore untouchable under § 1715 by reason of the legislative history quoted above. Such is not the law. In the first place, the statutory exemption language contains no such carve-out. The unambiguous text of § 1715 allows exemption of "any specified activity" of regulated "persons" from "any requirement of this chapter." If the statutory text is unambiguous, there is no occasion for resort to the legislative history; *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984) *("Chevron").*

Moreover, a similar argument was considered and judicially rejected in the early days of litigation on similar exemption powers granted by Congress to the former

[3] I.e., the question of whether the repeated references to exemption of "persons" in § 1715 allow the Commission to grant exemptions only to individual petitioners when other service providers are similarly situated.

interstate Commerce Commission ("ICC"). In *American Trucking Associations, Inc. et al. v. interstate Commerce Commission, 656* F.2d 1115 (5th Cir. 1981) ("*ATA*"), the Court of Appeals was construing a broad statutory authorization for the ICC to grant exemptions from the Staggers Rail Act of 1980, Pub.L. No. 96-448, to "a person, class of persons, or a transaction or service" with respect to "a matter relating to a rail carrier" under ICC jurisdiction; see former provisions of 49 U.S.C. § 10505 (1981). When a Staggers Act exemption for certain transportation *in railroad-owned trucks* was challenged on grounds that it did not involve a "matter relating to a rail carrier," the Court considered and rejected arguments that various other contemporaneous amendments to Title 49 implicitly limited the breadth of the "relating to" language. Instead, the Court held as follows (656 F.2d at 1120):

> Because we find rail-owned truck transportation . . . within the scope of the literal language of section 10505, and because we find no clear indication in the remainder of the Act . . . that such service was not a proper subject for an exemption, we reject petitioners' argument that the Commission exceeded its statutory authority in granting the exemption.

Although the Court likewise found no such "clear indication" in the "legislative history" of the Staggers Act (id.), that language can be disregarded in light of the subsequent decision in *Chevron,* supra. Currently, then, the lesson of *ATA* is clear: the mere fact that Congress legislates a particular rule as part of a statute does not, without more, limit the subsequent ability of an administrative agency to modify that rule under a contemporaneously enacted general exemption provision. In terms of OSRA, the mere fact that Congress declined in 1998 to eliminate tariff publication requirements, or to allow NVOCCs to enter into service contracts with their customers, does not forever bar this Commission from modifying those requirements by exercising its broad statutory power to grant exemptions from "any requirement" of OSRA.[4]

[4] Of course, the situation would be different if the words of the exemption statute specifically declared certain statutory requirements sacrosanct. Compare *Regular Common Carrier* Conference et *al. v.* United *States,* 820 F.2d 1323 (D.C. Cir. 1987) (construing former exception

Once the comprehensive scope of the OSRA exemption authority is fully understood, the only remaining question is whether a proposed exemption meets the criteria stated in 46 U.S.C. App. § 1715. Under those criteria, the issue is whether the exemption will "result in substantial reduction in competition or be detrimental to commerce." Menlo submits that the Commission should encounter little difficulty in resolving that issue with regard to pricing by NVOCCs. For reasons already stated, there can be little doubt that leveling the playing field for NVOCC pricing will increase competition for ocean freight rather than reducing it (substantially or otherwise). It appears equally certain that such action will be a stimulant to commerce, rather than a detriment, because it will assist U.S. based logistics providers in reaching their full competitive potential as technically advanced facilitators of international trade.

As a final point under this heading, Menlo submits that the right and duty of an agency to consider changed circumstances is inherent in an exemption provision such as § 1715. Of necessity, the Commission must evaluate an exemption proposal by considering whether the involved provisions of a statute enacted in 1998 (OSRA) are working as anticipated in late 2003. Had there been no changed circumstances in the past five years, there might not be any reason to disturb the accommodations reached in 1998. In fact, however, the pace of recent change in global logistics has been breathtaking and it continues to accelerate.

The five petitioners have pointed out such changes as the migration of most VOCC traffic from tariffs to service contracts, the virtual disappearance of U.S. flag VOCCs except in niche markets, and the proliferation of NVOCCs having the advantages of affiliation with VOCCs (most of whom are now foreign-flag operators). In addition, Menlo submits that one statistic speaks volumes. A leading transportation consulting firm (Armstrong & Associates) has estimated that the size of the global market for contract logistics services has doubled to

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of certain intermodal acquisitions from ICC's Staggers Act exemption powers). But no such exception exists here.

$60 billion per year since 1996; *see Transport Topics* (issue dated September 30, 2002) at p. 12. To an ever-increasing extent, therefore, the marketplace obviously demands integrated, multimodal logistics services. In the management of today's supply chains, it is clear that fragmented, mode-specific pricing restrictions serve only as a needless impediment.

(4) Scope of Exemption: Finally, Menlo urges the Commission to avoid two extremes when determining the parties to be included in any exemption granted. On one hand, Menlo submits that granting exemptions only to particular providers that have petitioned for them would raise fairness issues and would distort competition between similarly-situated providers. In addition, such an approach would raise the question of whether the otherwise comprehensive exemption authority in § 1715 allows the granting of exemptions limited to a particular party, or whether the words of the statute require that such relief be granted only to a defined class of "persons."

On the other hand, Menlo urges the Commission not to attempt to define eligibility for a class exemption in terms of arbitrary criteria having no foundation in the agency's governing statute. Menlo is confident it would qualify under criteria such as those suggested by BAX and Robinson. As a policy matter, however, the procompetitive criteria for exemptions under § 1715 would be called into question by limiting relief to just those NVOCCs with a certain level of existing "assets," with certain "value added,, service offerings, or with some defined level of existing participation in ocean transportation. Such exemption criteria would only tend to freeze the marketplace, and to perpetuate the regulatory disconnect between ocean freight and other modes. If criteria relating to financial and operational responsibility are thought appropriate for defining exemption eligibility, such criteria already exist. The Commission need only limit the exemption to NVOCCs that:

(i) are in compliance with the bonding requirements at 46 CFR § *515.21;*

(ii) operate in conformity with the “doing business” requirements of 46 CFR §§ 515.31-42 inclusive (including the ground rules for acting as a freight forwarder and an NVOCC on the same shipment); and

(iii) are in compliance with the fitness-based OTI licensing processes (including ongoing notification requirements) that are set forth at 46 CFR §§ 515.1 1-1 8, rather than merely maintaining bonds as an “offshore” NVOCC under 46 CFR § 515.21 (a)(3).

Conclusion: In deliberating on OSRA, Congress may not have anticipated the full extent of the onrushing intermodal and logistics revolution during the ensuing five years. But Congress did anticipate that changed circumstances could require further reductions in ocean freight regulation. The broad exemption provisions in § 1715 are there for a reason, and Menlo submits that the reason is to meet the ongoing need for managing marketplace changes.

As indicated earlier, Menlo takes no position as to the precise contours of the exemption that should be granted. For the reasons stated, however, Menlo does believe that the statutory criteria and changing market conditions warrant approval of either or both of the major proposals now before the Commission -- i.e., an exemption permitting Licensed, compliant NVOCCs to enter into service contracts with their customers, and/or an exemption of such NVOCCs from tariff filing requirements. Either way, we urge the Commission to recognize that the world of logistics has changed, that ocean freight pricing regulations need to be more in step with those of other modes, and that the agency can and should take action to level the playing field between competitive U.S. based NVOCCs and foreign-flag, cartelized VOCCs. There is simply no good reason for the latter to be less regulated than the former.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments in reference to Petition Nos. P3-03, P5-03, P7-03, P8-03 and P9-03 have been served this date by first-class mail, properly addressed and with postage prepaid, upon Petitioners' respective counsel as follows:

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Dated at Washington, D.C. this tenth day of October, 2003.

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